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Supreme Court Of The United States

OCTOBER TERM — 1947

NUMBER 773

WILLIAM SIEGOTT and EUGENE SCHULER,
Petitioners,

vs.

STATE OF SOUTH DAKOTA,
Respondents.

APPEAL FROM THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

RESPONDENT'S BRIEF

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SUBJECT INDEX

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Petitioners,

-vs-

STATE OF SOUTH DAKOTA,
Respondents.

RESPONDENT'S BRIEF

I

STATEMENT DENYING JURISDICTION

It is the claim of the petitioners that the record shows that at the trial of this case in the Circuit Court of South Dakota, they were deprived of certain constitutional rights which were guaranteed by the Constitution of the United States. The specific constitutional provisions invoked by their petition for Writ of Certiorari involves the First, Fifth and Fourteenth Amendments to the Constitution.

The First Amendment provides that Congress "shall make no law***abridging the freedom of speech***."

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty or property without due process of law***."

The Fourteenth Amendment provides: "nor shall any state deprive any person of life, liberty or property without due process of law."

It is the claim of Respondents that the Petition for the Writ does not present a controversy over which this court has jurisdiction. No Federal question is presented. Particularly the Petition does not present a controversy arising un-

der the First, Fifth, or Fourteenth Amendments for the following reasons:

The claim of Petitioners that their right of free speech guaranteed by the First Amendment was made for the first time in this court in their Petition for the Writ. No such claim was made in any manner or at any time at the trial in the Circuit Court, by any motion, objection or otherwise, and therefore no ruling of the trial court was made thereon. Neither was any such claim made by Petitioners in their appeal to the Supreme Court of South Dakota, by appropriate Assignment of Error or otherwise. Consequently, there was no decision of the State Court in relation thereto which can be brought here for review.

The provisions of the Fifth Amendment to the Constitution protecting a defendant from self-incrimination have no application to states or state courts. This amendment is one of the first ten amendments to the Federal Constitution which are known as the Bill of Rights. It has uniformly been held by this court in a long line of decisions that the Bill of Rights was a limitation on Federal Courts but did not place limitations on the power of State courts, except as they may have been made subject thereto in certain cases by the Fourteenth Amendment.

This distinction as to State and Federal Courts is stated in the text of 11 Am. Jur. Constitutional Law, Section 310, as follows:

> "The extent of the operation of the Federal Bill of Rights is well settled. Since the Constitution of the United States only takes from the states for Federal exercise enumerated express powers and those necessarily implied and, moreover, since the states are left with all powers of sovereignty the exercise of which is not expressly forbidden, the limitations that the Constitution of the United States imposes upon the powers of government are upon the government of the Union only, except where the states are expressly mentioned. In the application of this doctrine specifically to the guaranties contained in the Federal Bill of Rights, it has been held since the early days of our

constitutional history that the First Ten Amendments or, as some of the authorities more accurately put it, the First Eight Amendments, forbid the abridgment only by acts of Congress or the United States Government, its agencies and departments, of the rights therein guaranteed, and do not apply to acts of the states." states."

In the case of Ensign v. Pennsylvania, 227 U.S. 502, 57 L. Ed. 658, this court held that the governments of the several states or their judicial establishments are not obliged to accord the privilege against self-incrimination afforded by the United States Constitution, Fifth Amendment, but that this amendment regulates the procedure of the Federal Courts only. The court said:

> "Article 5 of Amendments to the Federal Constitution is invoked, which provides that 'No person*** shall be compelled in any criminal case to be a witness against himself; but as has been often reiterated, this amendment is not obligatory upon the governments of the several states or their judicial establishments and regulates the procedure in the Federal courts only."

In the recent case of Adamson v. California, 332, U.S. 46; 91 L. Ed. 1903, (1947), this court held that the clause of the Fifth Amendment protecting a person against being compelled to be a witness against himself is not made effective by the Fourteenth Amendment as a protection against state action on the ground that freedom from testimonial compulsion is a right of national citizenship, or because it is a personal privilege or immunity secured by the Federal Constitution as one of the rights of man that are listed in the Bill of Rights. The court said:

"It is settled law that the clause of the Fifth Amendment protecting a person against being compelled to be a witness against himself is not made effective by the Fourteenth Amendment as a protection against State action on the ground that freedom from testimonial compulsion is a right of national citizenship or because it is a personal privilege or immunity secured by the Federal Constitution

as one of the rights of man that are listed in the Bill of Rights.

The reasoning that leads to those conclusions starts with the unquestioned premise that the Bill of Rights when adopted was for the protection of the individual against the Federal Government and its provisions were inapplicable to similar actions done by the state."

Respondents, therefore respectfully urge that the record fails to present for review a case arising under the First, Fifth or Fourteenth Amendments and that this court is without jurisdiction to hear this appeal.

II

THE RECORD HEREIN PRESENTS NO QUESTION UNDER THE FIFTH AMENDMENT, EVEN IF THE FIFTH AMENDMENT SHOULD BE HELD TO APPLY.

Section 9 of Article 6 of the Constitution of South Dakota provides "that no person shall be compelled in any criminal case to give evidence against himself**," and this provision of the South Dakota Constitution was also invoked by Petitioners in their trial in Circuit and Supreme Courts of South Dakota.

The testimony which Sinnott claims he was compelled to give in violation of his constitutional rights is found at pages 54 and 55 of the printed Record herein. This testimony of Sinnott was given originally by him in a civil action pending in the Circuit Court in Pennington County in which the Petitioners here and others were Defendants. This evidence became a part of the record in this case by the testimony of the witness Fliday who was the official court reporter at the trial of both cases. This civil action was entitled Porter Buckingham, Plaintiff, -vs- William Sinnott, Rueben Schuler, et al, Defendants. While the nature of this civil action is not directly shown by the record, it may probably be assumed that it was a damage suit brought by the plaintiff against defendants arising out of the assault of Porter Buckingham, plaintiff, which is the assault involved in the present case. It affirmatively appears

from the record that the defendant, Sinnott, was called by the plaintiff as an adverse witness in the civil proceedings and that he was represented by counsel during his adverse examination. No claim of privilege was made by him or by his attorney at the time he was called or at the time he testified. The testimony that he gave is shown at pages 54 and 55 of the printed Record herein as follows:

Q. I will ask you, Mr. Fliday, if in the examination of William Sinnott the following questions were put to Mr. Sinnott and the following answers given by Mr. Sinnott: Question, "Who did you learn about the carload of boys going down to Wall from?" Answer, "I asked Schuler myself to go down to Wall to see if Hancock (fol. 88) was driving the truck and ask him not to continue driving it. I didn't know that Porter was driving that truck." Question, "You asked him before he went down to Wall?" Answer, "I asked Schuler to go; yes." Question, "When did you ask him to do that?" Answer, "When I found out that the truck had gone east that evening." Were those questions put to Mr. Sinnott and those answers given by Mr. Sinnott, Mr. Fliday?

A. Yes, sir, they were.

Mr. Bottum: That's all.

It does not appear that this testimony was elicited by compulsion or that it was incriminating. The first question asked the witness could have been answered by giving the name of the person inquired about in the question. The additional evidence given in the answer to the first question was wholly voluntary on the part of the witness. We urge that such voluntary testimony was not compulsory and was not incriminating. The privilege of silence protected by the constitutional provisions is for the benefit of the witness and is deemed to be waived unless invoked and a witness who claims that privilege can not testify and then contend that he is deprived of his constitutional rights. It is the right of the plaintiff in a civil action to call the defendant as a witness and interrogate him until the privilege is exercised. Wigmore on Evidence, 3rd Ed. 2268.

Apparently, Petitioners do not question the above

rule, but claim an exception here for the reason that the civil action was brought for the purpose of securing evidence to convict the defendant in a later criminal action. We urge that this claim finds no support in the record here.

For all the reasons herein urged, the Petition for Writ of Certiorari filed by the Petitioners herein should be denied.

Respectfully submitted,

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